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A HUD Lawsuit Against the Gun Industry?

Secretary Cuomo's Assault Weapon

Last month, Secretary of Housing and Urban Development Andrew Cuomo threatened to join the municipalities suing the gun industry to recoup the cost of fighting gun-related crime and force changes in the design and distribution of guns. Secretary Cuomo hopes his threat will pressure the industry to settle the suits and accept regulations the Clinton Administration has been unable to enact legislatively. These frivolous lawsuits and Secretary Cuomo's threat constitute:

- an assault on the Second Amendment and the right to self-defense;
- an assault on the democratic process;
- an attempt to blame the gun industry for government's failure to enforce laws that protect the public;
- a ploy by the trial bar to plunder another industry and by politicians to increase their power; and
- a threat to any industry whose products could be misused by criminals.

Of the 30 municipalities involved, judges so far have dismissed the suits brought by Cincinnati, Miami, and Bridgeport (Conn.), citing numerous legal errors. The Durham County (N.C.) board of commissioners recently rejected the idea of a lawsuit. Last year, the U.S. Senate Appropriations Committee discussed an amendment by Senator Larry E. Craig (R-Idaho) to prohibit HUD from joining the suits. (The amendment was not put to a vote.)

An Assault on Americans' Constitutional Rights

The Second Amendment guarantees "the right of the people to keep and bear arms, shall not be infringed." The municipal lawsuits aim to destroy this right.

- Commenting on the impact Miami's suit would have on guns, Dade County Circuit Court Judge Amy Dean told Miami-Dade County attorneys, "*If you were to get exactly what you wanted, they'd be taken off the market entirely*" [Reuters, 11/16/99, emphasis added].

The lawsuits seek concessions from the gun industry that are clearly legislative in nature, such as restricting how the industry may sell firearms to dealers, limiting purchases to one gun a month, and regulations that virtually would destroy gun shows. Further, HUD and local authorities are demanding the industry sell guns with features that may cause the gun to fail during a crisis.

- Economist John R. Lott, Jr., writes, "The futuristic guns advocated in the New Orleans suit, such as guns activated by a radio signal from a wristband, are far from reliable and will cost \$900 when they are finally available. *Under the proposed requirements, the costs of gun locks would fall more heavily on law-abiding citizens than on criminals* — decreasing the number of innocent people who could use guns to protect themselves" [*National Review*, 12/21/99, emphasis added].

"All legislative Powers . . . shall be vested in a Congress"

"All legislative Powers herein granted shall be vested in a Congress of the United States," reads Article I, Section 1 of the Constitution. Section 8 reads, "The Congress shall have the Power . . . To regulate Commerce . . . among the several States[.]"

Whether through civics class or Saturday morning cartoons ("I'm Just a Bill . . ."), most Americans learned basic principles of American constitutional democracy. Only the legislature can make law. The executive branch enforces the law. The judicial branch interprets the law in specific cases. Yet proponents of these lawsuits have asked the courts to subvert the legislative process. And the Clinton Administration is as confused about who is supposed to enforce the laws as it is about who makes laws.

After New Orleans trial lawyer Wendell Gauthier made millions (billions?) suing the tobacco industry, he set his sights on gun makers. As Douglas McCollam reported in the *American Lawyer* (6/1/99, emphasis added):

"The [gun] suit fit with Gauthier's notion of the plaintiff's bar as *a de facto fourth branch of government*, one that achieved regulation through litigation where legislation failed."

The Clinton Administration has adopted Gauthier's disrespect for democracy. White House Press Secretary Joe Lockhart said [quoted in Kenneth D. Smith, "HUD Misfires," *Washington Times*, 12/16/99, emphasis added]:

"I think we have enormously important public policy goals, and if the Republicans, who control Congress, want to block sensible gun control . . . *we will find a way to do it.*"

The demands of the legislative process are not merely annoying obstacles that interfere with the wishes of a wise philosopher-king — they are a bulwark against tyranny. Congress makes the laws. Period. Any other "way to do it" is an assault on the Constitution.

Judge: Cincinnati Suit Violates the Constitution

In 1996 Federal Judge Douglas Woodlock reprimanded a plaintiff for trying to regulate gun makers through the courts [also quoted in Smith, 12/16/99, emphasis added]:

“It is the province of legislative or authorized administrative bodies and not the judicial branch, to advance through democratic channels policies that would directly or indirectly either (1) ban some classes of handguns or (2) transform firearm enterprises into insurers against misuse of their products. *Frustration at the failure of legislatures to enact laws sufficient to curb handgun injuries is not adequate reason to engage the judicial forum in efforts to implement a broad policy change.*”

The courts have been similarly harsh in dismissing the municipal suits. In an order dismissing Cincinnati’s suit “with prejudice,” Hamilton County Court of Common Pleas Judge Robert Ruehlman wrote [10/7/99, emphasis added]:

“In the view of this Court, the City’s complaint is an improper attempt to have this Court substitute its judgment for that of the legislature, *something which this Court is neither inclined nor empowered to do*. Only the legislature has the power to engage in the type of regulation which is being sought by the City here. Moreover, the City’s request that this Court abate or enjoin the defendants’ lawful sale and distribution of their products outside the City of Cincinnati *exceeds the scope of its municipal powers and*, to the extent it asks this Court to regulate commercial conduct lawful in other states, *violates the Commerce Clause of the United States Constitution.*”

Miami Suit Also Dismissed With Prejudice

Dade County Circuit Court Judge Amy Dean dismissed the suit brought by Miami-Dade County, writing [12/13/99]:

“The County does not have standing. . .

“Plaintiffs have not directed this Court to any statute or case that would allow a city or county to proceed against a group of manufacturers alleging generalized damages from defects in a variety of different products manufactured and legally sold by these various manufacturers over an indeterminate length of time. . .

“Costs of [government] services are not, without express legislative authorization, recoverable by governmental entities. . . No Florida statute authorizes the County to seek recovery for its costs of services provided. . .

“The County explicitly seeks to regulate aspects of the manufacture, sale, and distribution of firearms. Only the Florida legislature has the standing to authorize such a claim. . .

"The County has also claimed that its intent in filing this lawsuit was not regulatory, but merely that of a common law tort claim. However, the allegations of the amended complaint and the relief sought therein clearly indicate otherwise. . .

"The County cannot by amendment plead any set of facts which would support any cause of action against these defendants . . . In addition, the County's complaint can never overcome the preemptive bar of [Florida law], the bar against cost recovery embodied in the remoteness doctrine and the prohibition against municipal cost recovery under common law."

Judge: City of Bridgeport Lacks Standing to Sue

Meanwhile, Connecticut Superior Court Judge Robert McWeeny threw out the City of Bridgeport's complaint, writing [12/10/99]:

"The court finds as a matter of law that the plaintiffs lack standing to litigate these claims . . . The plaintiffs have no statutory or common law basis to recoup their expenditures. They lack any statutory authority to initiate such claims. . . They seek to regulate firearms in a manner that is preempted by state law. . .

"In advance of their unusual theories supporting this litigation, the plaintiffs draw inspiration if not precedent from the 'tobacco' cases. . .

"When conceiving the complaint in this case, the plaintiffs must have envisioned such settlements as the dawning of a new age of litigation during which the gun industry, liquor industry and purveyors of 'junk' food would follow the tobacco industry in reimbursing government expenditures and submitting to judicial regulation. . .

"The plaintiffs can cite no statute specifically authorizing them to recoup the expenditures they claim or obtain the injunctive relief they seek. . .

"Plaintiffs cannot seriously maintain that reasonable certainty in calculating their damage claims is within the realm of possibility. . .

"No ordinance has been passed by the Bridgeport city council to achieve the remedies being sought by this lawsuit. . . . That the lawsuit itself is a line item in the city's budget falls far short of the requirement . . .

"It is clear to this court that the plaintiffs seek to act or have the court act to control the flow of handguns in a more comprehensive manner."

Media Decries Abuse of Judiciary

The *Washington Post* criticized Secretary Cuomo for subverting the legislative and regulatory processes [12/17/99, emphasis added]:

“It seems wrong for an agency of the federal government to organize other plaintiffs to put pressure on an industry — even a distasteful industry — to achieve policy results the administration has not been able to achieve through normal legislation or regulation. *It is an abuse of a valuable system, one that could make it less valuable as people come to view the legal system as nothing more than an arm of policymakers.*”

The *Chicago Tribune* chastised Mayor Richard Daley for his \$433 million suit [11/14/98]:

“[Mayor Daley’s] lawsuit is wrongheaded and ill-advised. It represents an abuse of the tort liability system and a dangerous extension of the tactic — employed in similar lawsuits against the tobacco industry — of using potentially bankrupting lawsuits to force makers of legal but unpopular products to quit.”

Reich: “Blatant End-Runs Around the Democratic Process”

Clinton’s former Secretary of Labor Robert B. Reich has accused the Administration of making “blatant end-runs around the democratic process.” He writes [*American Prospect*, 1/17/00, emphasis added]:

“... Secretary of Housing and Urban Development Andrew Cuomo assured the press that the whole effort was just a bargaining ploy. ...

“But the biggest problem is that *these lawsuits are blatant end-runs around the democratic process*. We used to be a nation of laws ... This is nothing short of faux legislation, which sacrifices democracy to the discretion of administration officials operating in utter secrecy. ...

“... the way to fix everything isn’t to turn our backs on the democratic process and pursue litigation as the administration is doing.”

Americans Want Law Enforcement, not Lawsuits

It has yet to dawn on the Clinton Administration that Congress has not enacted radical gun control because the American people do not want more gun control or lawsuits against the gun industry, *they want the Clinton administration to prosecute criminals who misuse guns.*

- Syracuse University reports federal firearms prosecutions have dropped dramatically under the Clinton Administration (44 percent since 1992). The drop in prosecutions is far greater than the reductions in criminal investigators at the Bureau of Alcohol, Tobacco and Firearms (14 percent since 1992), indicating "other unknown forces or policy changes are apparently at work" [<http://trac.syr.edu/tracatf/index.html>, Transactional Records Access Clearinghouse, 1999].
- Americans prefer by a margin of 60 percent to 37 percent a congressional candidate who supports enforcing current gun laws and opposes gun control to a pro-gun control candidate, according to a December poll by Harris-Teeter for NBC News/*Wall Street Journal*.
- Further, today a majority of Americans blame the gun industry "not at all" for violent crime, according to a December poll conducted by Gallup for CNN/*USA Today*.
- In the same poll, 67 percent of respondents agreed with the statement that a federal lawsuit against the industry would have no merit.
- According to the National Center for Policy Analysis, a poll by the Tarrance Group found that while 84 percent of Americans feel those who misuse firearms should be held responsible, only 5 percent of Americans think manufacturers should be held responsible for firearms misuse.

Perhaps Congress should create a federal program to teach basic democratic principles to trial lawyers, mayors, and (current) Clinton Administration officials.

Blaming Industry for the Failures of HUD, Cities

Who is more responsible for stopping violent crime — government or the gun industry? As Judge Ruehlman noted, gun manufacturers "have no ability to control the misconduct of [criminals]." But government *can* fight crime. *That's why we have government.*

In essence, 30s municipalities who have been unable to stop violent crime within their jurisdictions are trying to blame gun manufacturers for their failure. Now, Secretary Cuomo is engaging in the same type of scapegoating, where he blames gun makers for HUD's failure to provide safe public housing. As University of Chicago economist Richard Epstein noted in the *Wall Street Journal* [12/9/99, emphasis added]:

"The gun industry does not determine the siting of [HUD] projects, does not screen or select tenants, does not run renewal and eviction policies, does not fix elevators, does not provide policing. Orthodox tort theory offers lots of precedent for suits against housing projects themselves for their failure to protect tenants from violent

crime. *The real question is: Why isn't the proper role of HUD and local authorities as defendants in lawsuits? They shouldn't be able to dump their failings on others.*"

The evidence that HUD itself has failed America's poor is not merely historical. According to HUD Inspector General Susan Gaffney [*Semiannual Report to Congress*, 9/30/99, emphasis added]:

"Since June 1997, HUD has been engaged in a major restructuring, known as HUD 2020, which . . . lacked an analytic basis. The new organizations called for by HUD 2020 have been established and staffed, but in most cases they are not fully operational and it remains unclear when they will be fully operational or what their effect will be on HUD operations. In two cases, however — Community Builders and Management and Marketing contracting — *we have already seen negative effects.*

"Since January 1997, HUD has resisted efforts to streamline/consolidate HUD programs, and has instead taken every opportunity to propose new, narrow initiatives. *The Gun Buyback initiative stands as a testament to HUD's eagerness to ride currents of public opinion that lead the Department away from its core mission.*

"Since January 1997, *despite HUD's vow to get off the General Accounting Office's High Risk List, we continue to report essentially the same material weaknesses every year in the OIG's audits of HUD financial statements.* As an example of the slow progress toward institutional reform, we have found that organizational changes in the procurement process haven't translated to significantly improved procurements. . . .

"While these perspectives may appear bureaucratic, even boring, they have a direct effect on the quality of HUD service to the people who need HUD's help. *We are a long way from HUD's meeting the key objectives the Secretary announced in June 1997: 'outstanding performance, efficiency, and accountability to the American people.'*"

It would seem Secretary Cuomo has plenty to do without taking on any new responsibilities that "lead the Department away from its core mission."

In dismissing Cincinnati's suit, Judge Ruehlman affirmed it is government's duty to protect the public and rejected the city's attempt to make the gun industry stand trial for the city's failure [10/7/99, emphasis added]:

"As a matter of law, the City's payments [for public safety] arose out of its duties to its citizens and were not a benefit conferred on the defendants. . . In addition, absent statutory authorization, *the City may not recover for expenditures for ordinary public services which it has the duty to provide.*"

New Orleans: Big Distributor of Used Guns

Not only are the cities trying to dump their failures on someone else, they actually are trying to punish gun manufacturers *for activity the cities have engaged in themselves*. According to the *Wall Street Journal* [8/16/99, emphasis added]:

“Major cities that have taken the [gun] industry to court, including Boston, New Orleans and San Francisco, *have together poured hundreds of thousands of second-hand police guns into the civilian market.* . . .

“New Orleans Mayor Marc Morial, who filed the first city suit against the gun industry last October, has since been embarrassed publicly on the trade-in issue by [gun manufacturer] Glock’s vice president and general counsel, Paul Jannuzzo. Near the end of a joint appearance earlier this year on NBC’s ‘Today Show,’ Mr. Jannuzzo pointed out that *New Orleans is perhaps the biggest distributor of used guns in Louisiana*, having recently agreed to obtain new Glocks in a swap for 7,300 weapons seized in crimes, as well as 700 Berettas that had belonged to New Orleans police.”

According to the National Taxpayers Union Foundation, “Many of [the 7,300 surplus and confiscated guns that New Orleans involved in the swap] were TEC-9s and various other semiautomatic weapons whose importation and manufacture Congress banned in 1994” [<http://www.ntu.org/issues/state/ntufib118.htm>].

Lust for Power + Raw Greed

What could inspire such hypocrisy? As with the tobacco litigation, private lawyers representing the municipalities will be paid a percentage of the settlement or damages. Meanwhile, local politicians and the Clinton Administration can use the proceeds of litigation to shower favors on preferred constituencies.

- According to the National Taxpayers Union Foundation, at least 12 of the cities suing the gun industry suffered population losses between 1980 and 1994 (indicating a declining tax base).
- At the same time, per capita spending increased an average of 73 percent from 1975 to 1995 in those suing cities for which data are available [National Taxpayers Union Foundation].

As Robert Reich notes, Secretary Cuomo made his threat in an attempt to force the gun industry into a settlement with the cities.

- When trial lawyers used the threat of lawsuits to force health maintenance organizations into a settlement, even the liberal *Washington Post* described it as an “extortion racket” [12/2/99].

“First Tobacco. Now Guns. What Industry’s Next?”

If the municipalities and HUD were to succeed in court, many more industries would find themselves vulnerable to the innovative legal theories these plaintiffs advance.

- As Robert Reich writes in the *American Prospect*, “You might approve the outcomes in [Clinton’s tobacco and gun lawsuits], but they establish precedents for other cases you might find wildly unjust.”
- Governments spend millions every year to fight reckless and drunk driving. Should auto makers pay for criminal misuse of their products?
- Should the beer, wine, and liquor industries be forced to reimburse government the cost of fighting crimes committed by drunks, such as drunk driving and criminal use of guns?
- Should producers of fatty foods be held liable for obesity-related illness and death?
- The *Chicago Tribune* asks [11/14/98], “First tobacco. Now guns. What industry’s next?”

Nearly any product could be misused by criminals — making nearly all manufacturers potential prey for politicians and the trial bar.

The municipal suits — and Secretary Cuomo’s threat to join them — are nothing more than assault weapons that could be turned on any industry. They are a threat to the Second Amendment, to the democratic process, and to many legitimate and lawful industries; and, insofar as they distract us from the causes of crime, they are a threat to public safety as well. If ever an assault weapon deserved to be banned, it is this.

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